No. 11140

In the United States Circuit Court of Appeals

For the Ninth Circuit

BERNARD G. SHEPHERD,

APPELLANT,

vs.

MILDRED McDONALD, NOW MILDRED MUCK,

APPELLEE.

BRIEF OF APPELLANT

Upon Appeal from the District Court of the United States for the District of Oregon.

CHRISTOPHERSON & MATTHEWS and
PAUL M. LONG,
COAN & ROSENBERG,
RALPH A. COAN,
Attorneys for Appellant.

W. ELLIS RICHARDSON,
MOE TONKON,
Attorneys for Appellee.

STEVENS-NESS LAW PUB. CO., PORTLAND

INDEX

TABLE OF CASES

TABLE OF CASES (Cont.)

Page

No. 11140

In the United States Circuit Court of Appeals

For the Ninth Circuit

BERNARD G. SHEPHERD,
APPELLANT,

vs.

MILDRED McDONALD, NOW MILDRED MUCK,
APPELLEE.

BRIEF OF APPELLANT

Upon Appeal from the District Court of the United States for the District of Oregon.

STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION OF DISTRICT COURT AND CIRCUIT COURT OF APPEALS

This case arises on an appeal of Bernard G. Shepherd, bankrupt, from an Order of the District Court affirming Referee's Order discharging Bankrupt with

qualifications filed August 1, 1945 (R.* 36-37). The appeal is taken under Section 24, Bankruptcy Act, 1938; 11 U.S.C.A. Section 47 (R. 37-38). Bernard G. Shepherd was duly adjudged bankrupt by the District Court of the United States for the District of Oregon, December 16, 1941. Specifications of Objections to the Bankrupt's Discharge were filed by Mildred Muck, a creditor (R. 4-9). Bankrupt filed a motion to strike Third Specification of Objection (R. 10), which was denied by Referee's Order dated August 7, 1944 (R. 10). The Referee denied the First and Second Specifications of Objections to Bankrupt's Discharge by Order dated August 28, 1944 (R. 11-12). Objecting creditor did not review Referee's Order. The Referee granted the Bankrupt a qualified Discharge on March 3, 1945, under the terms of which the indebtedness of Mildred Muck was excepted. (R. 28-29). Bankrupt filed a timely petition for review of Referee's Order by the District Court (R. 30-35). The District Court sustained the Referee's Order giving the Bankrupt a qualified Discharge by Order dated August 1, 1945 (R. 36-37). This Appeal is prosecuted from said last mentioned Order.

STATEMENT OF THE CASE

Bernard G. Shepherd was adjudged Bankrupt by the District Court of the United States for the Dis-

*For brevity the Transcript of Record will be referred to herein as "R.".

trict of Oregon on December 12, 1941 (R. 14). Mildred Muck was listed as a creditor in the Bankrupt's Schedules and filed her proof of claim in these proceedings which was based on a judgment of the Circuit Court of the State of Oregon for the County of Multnomah dated February 7, 1935 in favor of Mildred McDonald (now Mildred Muck) (R. 45-47, 52-53).

On May 4, 1942 Mildred Muck filed Specifications of Objections to the Bankrupt's Discharge (R. 4-9). These Objections contained Three Specifications and came on for trial before the Referee on August 7, 1944.

The Bankrupt filed a Motion to Strike the Third Specification on the ground that no facts were alleged therein which would authorize or permit the denial of a discharge (R. 10). The Referee denied this Motion (R. 10).

After a trial of the issues raised by the First and Second Specifications the Referee denied and disallowed both of said Specifications and took the Third Specification under advisement (R. 11-12).

On the 3rd day of March, 1945, the Referee filed his Opinion in which he held and ruled that the Third Specification of Objection should be sustained so far as the claim of Mildred Muck was concerned and that the Bankrupt was only entitled to a qualified discharge from which the judgment owing the objecting

creditor, Mildred Muck, should be excluded (R. 12-28).

The Referee entered a Qualified Order of Discharge excepting therefrom the judgment due Mildred Muck which had been duly proved and allowed in this bankruptcy proceeding (R. 28-29).

The Bankrupt promptly reviewed the Referee's Order last referred to by a Petition to Review filed March 7, 1945 (R. 30-35). The District Court adopted the Referee's Opinion and affirmed the Referee's Order in a Memorandum of Decision dated and filed July 31, 1945 (R. 36), and on August 1, 1945 the District Court made and entered an Order Adopting the Referee's Opinion as the Opinion of the District Court, affirming the Referee's Order discharging the Bankrupt with qualifications (R. 36-37).

This Appeal is prosecuted from the Order of the District Court which affirms the Referee's Order and denies a Discharge to Bankrupt on the judgment of Mildred Muck.

The facts are clear and undisputed and are fully set forth in the Referee's Opinion.

There is only one question involved which is raised by the Third Specification of Objection. This question is:

> May one who is indebted upon a judgment obtained upon a debt or obligation previously scheduled in a prior bankruptcy proceeding, and which indebtedness was discharged in the prior bankruptcy proceedings, the judgment being ob-

tained subsequent to the discharge in the prior bankruptcy proceedings by reason of a new promise made by the Bankrupt, schedule such judgment in a subsequent bankruptcy proceeding filed more than six years after the discharge in his first proceedings, and be granted, and obtain, a discharge in the second bankruptcy proceedings from such judgment?

As stated by the Referee in his opinion, this question appears to be one of first impression under the Bankruptcy Act, and one that has never been passed upon by any court.

SPECIFICATIONS OF ERROR

1. The District Court erred in finding and holding that the debt owing by the Bankrupt to Mildred Muck, being a judgment entered against the Bankrupt on the 7th day of August, 1935, and scheduled by the Bankrupt in his voluntary petition, is the same debt as a debt owing to Mildred McDonald, now Mildred Muck, and scheduled in the Bankrupt's petition in bankruptcy filed June 27, 1931.

2. The District Court erred in finding and holding that the Bankrupt waived his right to a discharge in the present bankruptcy proceedings from a judgment obtained by Mildred Muck on the 7th day of August, 1935, based upon a new promise to pay the indebtedness from which Bernard G. Shepherd was discharged

in his bankruptcy proceedings filed June 27, 1931.

3. The District Court erred in finding and holding that Bernard G. Shepherd, Bankrupt herein, was not entitled to a discharge from the indebtedness owing Mildred Muck which was duly scheduled in these proceedings for the reason that the Bankruptcy Act of the United States expressly provides that a bankrupt is entitled to a discharge from all his provable debts unless he has committed one or more of the acts enumerated in Section 14 (c) of the Bankruptcy Act.

4. The District Court erred in finding and holding that the Bankrupt was not entitled to a discharge from the indebtedness owing Mildred Muck duly scheduled, proved and allowed in these proceedings.

5. The District Court erred in refusing to sustain Bankrupt's motion to strike the third specification of the objection filed by Mildred Muck, objecting creditor, in opposition to Bankrupt's discharge.

6. The District Court erred in finding and holding that Bernard G. Shepherd, Bankrupt, was not entitled to and could not seek a second discharge from the same obligation owing Mildred McDonald, now Mildred Muck, as that scheduled in his first bankruptcy proceeding filed June 27, 1931.

7. The District Court erred in finding and holding that to grant a discharge in this proceeding from the indebtedness owing Mildred Muck would be an abuse of process and an imposition on the Court for the rea-

son that a Bankrupt is entitled as a matter of right under the Bankruptcy Act to a discharge from all provable debts unless he has committed one of the acts set forth in Section 14 (c) of said Act.

8. The District Court erred in entering a qualified and restricted order of the discharge instead of granting Bankrupt a complete and full discharge from all his provable debts.

9. The District Court erred in finding and holding that Bankrupt waived all rights under the Bankruptcy Act to at any time whatsoever obtain a discharge upon the indebtedness of Mildred Muck by making a promise to pay said indebtedness subsequent to the discharge entered in Bankrupt's first bankruptcy proceedings.

10. The District Court erred in finding and holding that the Bankrupt had no right to schedule in this proceeding an indebtedness due and owing Mildred Muck because said indebtedness was discharged in his former bankruptcy proceeding.

11. The District Court erred in finding and holding that the new promise made by Bankrupt to pay the indebtedness of Mildred Muck theretofore discharged in his bankruptcy proceedings of June 27, 1931, made said indebtedness and any judgment obtained thereon a non-dischargeable debt in any valid bankruptcy proceedings filed by or against the Bankrupt at any time thereafter.

12. The District Court erred in entering an order adopting the opinion of the Referee as the opinion of the District Court and in affirming the order of the Referee discharging the Bankrupt with qualifications.

POINTS AND AUTHORITIES

POINT I

(a) Bankrupt entitled to a discharge as a matter of law.

Bankruptcy Act. Section 14; 11 U.S.C.A. Sec. 32.
Bankruptcy Act, Section 17; 11 U.S.C.A. Sec. 35.
In re Jacobs, 241 F. 620; 39 A.B.R. 385.
Hardie vs. Dry Goods Co., 165 F. 588; 20 L.R.A. (N.S.) 785.
Remington on Bankruptcy, Fifth Ed., Chap. L, Vol. 7, Pg. 399.
Remington on Bankruptcy, Fifth Ed., Sec. 3219, Vol. 7, Pg. 455.
Remington on Bankruptcy, Fifth Ed., Sec. 3516, Vol. 7, Pg. 768.
Williams v. U. S. F. & G. Co., 236 U.S. 549; 35 S. Ct. 289; 59 L. Ed. 713.

(b) The doctrine of Res Judicata does not apply to the facts in this case.

Remington on Bankruptcy, Fifth Ed., Sec. 3457, Vol. 7, Pg. 714.
30 Am. Jur. Sec. 172, Pg. 914.
30 Am. Jur. Sec. 180, Pg. 925.
30 Am. Jur. Sec. 201, Pg. 940.

Bankruptcy Act, Sec. 17; 11 U.S.C.A. Sec. 35.
Collier on Bankruptcy, Fourteenth Ed. Sec. 17.28, Vol. 1, Pg. 1657.
Supplement to Moore's Collier, Fourteenth Ed. under Sec. 17.28.
Local Loan Company v. Hunt, 292 U.S. 234; 78 Law. Ed. 1230; 24 A.B.R. (N.S.) 668.
In re: Bybee, 124 Fed. 1011.
Matter of Charles S. Baker, 275 Fed. 511; 47 A.B.R. 255.
Matter of Dierck, 37 A.B.R. (N.S.) 198.
Prudential Loan & Finance Co. v. Roberts, 52 Fed. (2) 918.
Bluthenthal v. Jones, 208 U. S. 64; 52 L. Ed. 390.

POINT II

The making of a new promise to pay a debt discharged in a prior bankruptcy proceeding is not a waiver to the right to thereafter schedule in a subsequent bankruptcy proceeding, a judgment based on the new promise and be discharged therefrom.

Remington on Bankruptcy, Fifth Ed., Sec. 3499.50, Vol. 7, Pg. 756.
67 C. J. Sec. 1, Pg. 289.
67 C. J. Sec. 4, Pg. 299.

POINT III

A Judgment based on a new promise to pay a debt theretofore discharged in bankruptcy is a new indebtedness and is not the same indebtedness as the one formerly discharged.

Matter of Cox, 47 A.B.R. (N.S.) 668; 33 Fed. Sup. 796.
8 Corpus Juris Seccundum, Sec. 583 (d), Pg. 1577.
Wolffe v. Eberlein, 74 Ala. 99; 49 Am. Rep. 809.
Mathewson v. Nedham, 81 Kan. 340; 105 Pac. 436; 26 L.R.A. (N.S.) 274.
6 Am. Jur. 535.
Holden v. Chamberlain, 46 N. D. 353; 179 N. W. 706.
Bluthenthal v. Jones, 208 U. S. 64; 52 L. Ed. 390.
U. S. National Bank of LaGrande v. Miller, 118 Or. 280; 246 Pac. 726.

ARGUMENT

POINT I

Under this point, we will direct the argument to cover specifications of error 3 to 8 inclusive and specifications of error 11 and 12. Each of these specifications present similar questions of law and will therefore be considered together.

In order that the court may have the bankrupt's position clearly presented, Section 14 and Section 17 of the Bankruptcy Act appear in full in the Appendix A-1.

It will be readily seen from a reading of sections 14 and 17 of the Bankruptcy Act that a bankrupt is entitled to a discharge, as a matter of right, and it is the absolute duty of a court sitting in bankruptcy to grant this right to a bankrupt in accordance with the

provisions of Section 14, unless it is made to appear to the satisfaction of a court that the bankrupt has violated some one of the provisions of sub-section (c) of Section 14.

The right to a discharge in bankruptcy is absolutely guaranteed to an honest bankrupt. This right is a most precious one, involves the happiness and security of not only the bankrupt himself, but the welfare and prosperity of the community in which he lives.

It is a right that the United States Courts have uniformly held to be inviolate and enforceable, unless the bankrupt, by reason of dishonest conduct, or failure to obey the court's orders, has, himself, forfeited it.

The very terms of the statute disclose the intention of Congress in this regard. The words used in the statute are *must* and *shall;* these words leave little discretion in a given case where the facts do not clearly bring the bankrupt within the provisions of those exceptions which are embodied within the Act, itself.

Remington on Bankruptcy, in his Fifth Edition, Chapter L. Vol. 7 beginning at Page 399, discusses the question of discharge at great length, and points out that, while, originally, bankruptcy laws were enacted principally for the benefit of creditors, that, as time went on, it was determined that the interests of

the public could best be served by granting discharges to honest bankrupts to rehabilitate one who, through misfortune, has become indebted, and, unless relieved therefrom, would become a virtual charge upon the community.

Thus, the various bankruptcy acts of the United States have become more and more liberal in the granting of discharges. Congress has granted more and more relief to insolvent debtors by greatly extending the scope of the Bankruptcy Act, all in the public interest, until, today, bankruptcy is no longer considered dishonorable, but is known to be a means granted to the people of the United States to enable unfortunate, harassed, but honest men to get a new start in life, and to become again useful, productive and honorable citizens.

The courts have repeatedly stated that the right given to secure a discharge by the Bankruptcy Act should be liberally construed.

In the case of In Re: Jacobs 241 F. 620, 39 A. B. R. 385 (C. C. A. Ohio), the court said:

> "The language giving the right to secure a discharge in bankruptcy ought, therefore, to be liberally construed.
>
> "Indeed, where an application for a discharge is seasonably filed in a District Court, the Judge of the court is 'bound to grant it unless upon investigation' it appears that the bankrupt has 'committed one of the six offenses which are specified' in Section 14b."

Again, we find similar expressions in the case of Hardie v. Dry Goods Co., 165 F. 588, 21 A. B. R. 457, 20 L.R.A. (N.S.) 785 (C.C.A. Tex.):

> "Originally, in bankrupt laws, the discharge of the bankrupt may have been incidental, and the main purpose the equal distribution of his goods among creditors; but to say it now, and of the present law, we must shut our eyes to the actual practice in our courts. In nearly all and every voluntary bankruptcy brought under the present law the administration or distribution of the bankrupt's property has been practically concluded before filing petition, and the sole object of the petitioner is to be relieved of his debts, and in number the voluntary cases are about four to one of the involuntary. (See Report, Dept. of Justice, 1907). And the same may be said of the voluntary cases under the Act * * * 1867, * * * which was passed mainly to relieve the unfortunate debtors ruined by and through the vicissitudes of the great Civil War.
>
> "For these considerations, we are disposed to deny that in the present bankruptcy law the discharge of the honest debtor is a mere incident which could have been omitted without impairing its symmetry and efficiency; and, on the contrary, to assert that the release of the honest, unfortunate, and insolvent debtor from the burden of his debts and his restoration to business activity, in the interest of his family and the general public, are the main, if not the most important, objects of the law."

We quote further from Remington on Bankruptcy, Fifth Edition, Sec. 3219, Vol. 7, P. 455.

> "Section 3219. Unless Bankrupt Commits One of Acts Prohibited His Discharge 'Shall' be Grant-

ed.—Unless the bankrupt has committed some one or more of the acts prohibited by the Bankruptcy Act, his discharge 'shall' be granted. And Section 14 (c), 11 U.S.C.A. Section 32 (c) prescribed what acts will bar discharge."

All provable debts, except those that are expressly excepted by the Bankruptcy Act, are discharged.

Remington On Bankruptcy, Fifth Edition, Section 3516, Volume 7, Page 768

where the author says:

"Section 3516. Dischargeability of All 'Provable' Debts, Except Those Excepted. — All provable debts, demands and claims, whether allowable in full or in part, are discharged, except those especially excepted by Section 17 (a) of the act, 11 U.S.C.A. Section 35 (a), and debts, demands and claims not provable, are not discharged * * * ."

In view of the express provisions of the Bankruptcy Act, considering the many expressions of our courts on the question of the right to a discharge guaranteed to an honest bankrupt, remembering the express intention of Congress in liberalizing and extending the beneficial provisions of this Act to include farmers, corporate reorganizations and similar provisions, it is submitted that no court should, without compelling reasons, and in the most clear-cut cases, deny to a bankrupt a discharge which, after all, is the most important right and the one purpose and object which has actuated Congress in the enactment of bankruptcy legislation.

Let us then consider the facts in this case.

It is conceded that the third specification of objection in this case does not set forth any of the prohibited provisions enumerated in sub-division (c) of Section 14 of the Bankruptcy Act.

At the hearing before the Referee, the Bankrupt filed a motion to strike the third specification of objection, on the ground that there were no facts set forth therein which were sufficient to sustain an order denying the Bankrupt his discharge (R. 10).

This motion was denied by the Referee (R. 10), and the order entered by the Referee denies the bankrupt a discharge of the debt of the objecting creditor (R. 28-29), although there is no evidence in the record, nor are there any facts stated by the Referee in his opinion, which could, under the provisions of the Bankruptcy Act, deny the bankrupt his discharge. This order of the Referee was affirmed by the District Court (R. 36-37).

The Referee, in his opinion, which has been adopted by the District Court (R. 36)*, states that the facts in this case are analogous to a situation where a bankrupt, prior to the enactment of the present Bankruptcy Act, known as the Chandler Act, failed to apply for a discharge within the time limited by the former Act, or disobeyed the orders of the

*Wherever the argument mentions Referee's opinion, it also includes the opinion of the District Court.

court in failing to pay the cost of the proceedings.

Many caess are cited to support this rule.

The writer of this brief has no quarrel or disagreement with any of the cases cited in this connection. Most of the cases have become of no force or effect by reason of the fact that the Chandler Act, by its express terms, makes it the duty of the court to grant the bankrupt a discharge on its own motion, unless it is found that some of the acts prohibited in Section 14 have been committed by the bankrupt.

Here again we find an instance of the intention of Congress in protecting, guaranteeing and aiding an honest bankrupt in obtaining a discharge.

It is pointed out in this opinion that many of the cases adhered to the rule of denying a bankrupt a discharge because he had failed to apply for the same within time, even though his failure was due to the neglect, or, sometimes, the dishonorable conduct of his counsel, the Referee concluded, therefore, that if the courts, in these hard cases, adhere strictly to the rule announced that, certainly, in a case such as is now before this court, this court should depart from the express provisions of the Bankruptcy Act and find a reason why the bankrupt in this case should be denied a discharge, no matter what hardship may result therefrom.

We cannot follow this reasoning. There is no contention here that Bernard G. Shepherd has not com-

plied in every particular with the orders of this court, has not fairly and honestly disclosed all of his indebtedness, has not promptly paid into the registry of this court all costs and expenses required of him to be paid, or has not fully accounted for all his property.

Certainly, neither the Referee, nor the objecting creditor, have found or produced any fact showing that this Bankrupt is not an honest man, has not fully complied with the Bankruptcy Act, and he should, therefore, be entitled to a discharge.

In this connection, we wish to quote from a case referred to in the Referee's opinion, and which shows the attitude of the court, even of the Supreme Court of the United States.

In Williams vs. United States F. & G. Co., 236 U. S. 549; 35 S. Ct. 289; 59 L. ed. 713; the Supreme Court of the United States said on Page 716 L. ed.:

> "It is the purpose of the bankrupt act to convert the assets of the bankrupt into cash for distribution among creditors, and then to relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes. Wetmore v. Markoe, 196 U. S. 68, 77, 49 L. ed. 390, 394, 25 Sup. Ct. Rep. 172, 2 Ann. Cas. 265; Zavelo v. Reeves, 227 U. S. 625, 629, 57 L. ed. 676, 678, 33 Sup. Ct. Rep. 365, Ann. Cas. 1914D, 664; Burlingham v. Crouse, 228 U. S. 459, 473, 57 L. ed. 920, 926, 46 L.R.A. (N.S.) 148, 33 Sup. Ct. Rep. 564. And nothing is better settled than that statutes should be sensi-

> bly construed, with a view to effectuating the legislative intent. Lau Ow Bew v. United States, 144 U.S. 47, 59, 36 L. ed. 340, 344, 12 Sup. Ct. Rep. 517; Re Chapman, 166 U. S. 661, 667, 41 L. ed. 1154, 1158, 17 Sup. Ct. Rep. 677."

The Referee holds that, because the Bankrupt once obtained a discharge in bankruptcy from an indebtedness owing the objecting creditor, which he waived by making a new promise to pay it, and which later was used as the basis of obtaining the judgment scheduled in the present proceedings and having been accorded relief in his first bankruptcy proceedings from oppressive obligations arising from business misfortunes, he thereby waived his right to any relief in bankruptcy on this obligation and indebtedness forever.

It is respectfully submitted that, if this doctrine is to be adopted by our courts, much of the beneficial relief, which is the manifest purpose of the Act, will be denied to honest debtors. No one would contend that it was not an honest and honorable act for one who had been discharged in bankruptcy from an indebtedness, to later, when he found himself able, agree to pay the indebtedness, even though not legally bound so to do. This is not a dishonest act; it is, on the contrary, a most honorable one, but life is full of many disappointments and manifold misfortunes. A man may be prosperous today, have high expectations, believe himself capable of great things. Tomorrow, adversity strikes him, and he finds himself unable to

carry out his good intentions and his rosy promises. Is such a one to be denied relief, simply because he had misfortune more than once? Many honorable men have been forced into bankruptcy through sickness or misfortune on two, nay, three and four occasions. In fact, the Bankruptcy Act expressly provides that one may avail himself of its provisions for a discharge once every six years. If it were the intention of Congress that a person could only once have the benefit of a discharge in a case like the one here presented, the law would so expressly provide.

The Bankrupt, in this case, did obtain a discharge in 1931. He later promised to pay Mildred McDonald, now Mildred Muck. She promptly sued him and obtained the present judgment, and with this weapon she harassed him at every opportunity, made it impossible for him to keep a position or to obtain the money with which to carry out his new promise. Nay, he was probably more unfortunate after this judgment was obtained than he was at the date of his first adjudication. Is he to be left forever without the benefits of an act which expressly provides that he can apply for relief a second time at the end of six years?

Is there any difference between this judgment and other new indebtedness incurred by this Bankrupt after his former discharge, so far as the effect upon his future, his ability to earn a livelihood, or his becoming a public charge, all of which, as we have here-

tofore stated, are the underlying reasons for the enactment of this legislation.

The Referee finds, and states in his opinion, that, because Bernard G. Shepherd once obtained from this court a discharge upon the indebtedness of Mildred Muck, formerly Mildred McDonald, in a bankruptcy proceeding in 1931, he is imposing upon this court by asking a discharge in this proceedings from a judgment granted long after the first discharge by reason of his promise to pay this obligation and the Referee finds that to permit him to obtain a discharge in this proceeding would be an abuse of process, as well as an imposition upon this court.

We respectfully submit that there is nothing in this record, nor is there anything to be found in any of the cases cited by the Referee in his opinion, which should lead this court to any such conclusion.

It is true that in some of the decisions cited by the Referee the courts have said that where a bankrupt had scheduled indebtedness in a bankruptcy proceeding and had failed to obtain a discharge therefrom, that to file a subsequent proceeding, in which the same debts were scheduled, and again pray for a discharge on these debts, would be an imposition upon the court and an abuse of process. But, in all of these cases we find that the bankrupt had failed to obey the court's orders, or had committed some dishonest act, which deprived him of the right to a discharge. In such case, a bankrupt, by filing a second petition

and listing the same indebtedness, was, of course, attempting to circumvent the plain provisions of the Bankruptcy Act, or was, in effect, saying to a court: True, I have refused to obey the orders of this court in a prior proceeding, I have failed to pay the costs in the prior proceedings, although requesting relief, and now I wish to obtain those benefits which I either was not entitled to as a matter of law, or of which I deprived myself by failing to obey the court's orders.

This is a far different situation than the one presented by the record in this case.

RES JUDICATA DOES NOT APLLY IN THIS CASE

The Referee states, in his opinion, that the cases which deny to a bankrupt a discharge in subsequent bankruptcy proceedings from debts scheduled in a prior proceeding, in which a discharge was denied, are based upon the doctrine of res judicata. These cases do proceed upon this theory, and most of them rest their decisions upon this doctrine. We submit that the facts in this case are not in any way analogous to the facts in any of the cases cited by the Referee in his opinion or relied upon in reaching the conclusions of law therein set forth.

The Bankruptcy Courts, in passing on this question and laying down the above mentioned rule, have proceeded on the theory that a petition for a dis-

charge is an independent legal proceeding and when properly raised and determined by a Bankruptcy Court that the decision becomes res judicata in all subsequent proceedings by the bankrupt and his privies in relation to the facts so determined. Remington on Bankruptcy, Fifth Edition, Sec. 3457, Vol. 7, P. 714.

In relying upon the doctrine of res judicata as conclusive on the above mentioned issue of the effect of the denial of a discharge in former bankruptcy, the Courts have gone no farther than to say that the denial of a discharge has the effect of a judgement on the issues before such Court, that is, either failure to timely apply for a discharge, which is construed as giving rise to a default judgment, or the trial of specific objections based upon some one of the acts prohibited in Section 14 of the Act, and a determination by the court that the bankrupt was not entitled to a discharge.

Manifestly, the only issue determined in such a proceeding is whether or not the bankrupt in *that* proceeding was entitled, as a matter of right, on the then existing facts, to a discharge.

The Referee, in referring to the doctrine of res judicata in connection with the third specification of objection, may, perhaps, refer to the judgment of the Circuit Court of Multnomah County, Oregon, which gave to Mildred Muck her judgment, now scheduled in this proceeding.

The doctrine of res judicata is well recognized, but, of course, is subject to very definite limitations.

Let us see what the Courts have generally laid down as the meaning and extent of the doctrine of res judicata.

In Vol. 30, American Jurisprudence, the text defines the term as follows:

> "A final judgment rendered by a Court of competent jurisdiction, on the merits, is conclusive as to the rights of the parties and their privies, and as to them constitutes as absolute bar to a subsequent action involving the same claim, demand, and cause of action. If, however, the two suits do not involve the same claim, demand and cause of action, such effect will not be ordinarily given to the prior judgment. In this respect, it is worthy of notice that there must be not only identity of subject matter, but also of the cause of action, so that a judgment in a former action does not operate as a bar to a subsequent action, where the cause of action is not the same, although each action relates to the same subject matter." 30 Am. Jur., Sec. 172, Pg. 914.

The text goes on in a subsequent section and says:

> "The rule granting conclusiveness to a judgment in regard to issues of fact which could properly have been determined in the action is limited to cases involving the same cause of action. Where a second action is upon a different claim, demand, or cause of action, the established rule is that the judgment in the first action operates as an estoppel only as to the points or questions actually litigated and determined, and not as to matters not litigated in the former action, even though such matters might properly have been deter-

> mined therein. Accordingly, before the doctrine of res judicata is applied in such cases, it should appear that the precise question involved in the subsequent action was determined in the former action. These rules prevail whether the judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive per se." 30 Am. Jur., Sec. 180, Pg. 925.

The rule is stated in Section 201, Am. Jur., as follows:

> "In order that a judgment may operate as a conclusive determination of a cause of action, or of facts litigated therein, it is necessary that it should have been rendered by a court of competent jurisdiction of the parties and of the subject matter. The fact that a person invokes the jurisdiction of a court does not preclude him for questioning its jurisdiction of the subject matter when its judgment is asserted as res judicata. On the other hand, the fact that a person attacks the jurisdiction of a court does not exempt him from the operation of the judgment under the doctrine of res judicata."

If, therefore, it is contended in the instant case that the judgment of the Circuit Court of Multnomah County, Oregon, in favor of Mildred Muck and against the bankrupt is conclusive on the subject of the dischargeability of such judgment in a subsequent bankruptcy of the judgment debtor, it must be made to appear that this issue was not only raised and determined by the Circuit Court, but also that the Court had jurisdiction to pass upon that question.

It must be conceded that the Circuit Court of Multnomah County, Oregon, did not have before it

any such issue as this. In fact, no such issue then could have been raised because the facts to support such an issue did not exist.

Further than this, *and much more vital,* is the fact that the Circuit Court of Multnomah County, Oregon had no jurisdiction whatever to grant or to deny of a discharge in bankruptcy to Bernard G. Shepherd in any proceeding.

It has, of course, been held so many times that the jurisdiction of a bankruptcy court is exclusive in reference to all matters arising in a bankruptcy proceeding itself that it is not necessary to cite authority to support this statement.

Referring again to the provisions of the Bankruptcy Act quoted in this Brief, it might be well to point out that the granting or denial of a discharge in bankruptcy is the exclusive province of a Bankruptcy Court made so by the provisions of the Act, Section 14.

Section 17 of the Act, Appendix A-1, deals with debts which are not affected by a discharge and, generally speaking, it is the province of a State Court to pass on the question of dischargeability of a particular debt.

Therefore, in the instant case it became the province of the Circuit Court of Mutlnomah County, Oregon to pass on the question as to whether or not the debt of Mildred Muck was an enforeable one when

the question was raised in that forum. In passing upon this issue, the Circuit Court determined that the former adjudication had been waived by the making of a new promise, and that is all it did, or could decide.

Collier on Bankruptcy, 14th Ed., Vol. 1, Sec. 17.28, Pg. 1657, discusses the question as to what Court determines the effect of a discharge and says that, ordinarily, it is for the State Court and not the Federal Bankruptcy Court to determine the effect of a discharge. The Federal, or Bankruptcy Court, has the exclusive right to determine whether a discharge shall be granted or denied, but ordinarily the Bankruptcy Court does not have jurisdiction nor does it assume to pass upon the question as to whether a particular debt has been discharged.

It is only in exceptional cases where a Bankruptcy Court proceeding under its equitable jurisdiction has undertaken to pass on this question.

In the Supplement to Moore's Collier, 14th Ed., under Sec. 17.28, the author discusses this question at length, referring to the cases dealing with this question, and among other things the author says:

> "The Courts, however, have in almost every instance denied these attempts and several notable opinions have emphasized the general rule stated in the Treatise; that the bankruptcy court merely determines the *right* to a discharge but does not, and except in certain circumstances hereinafter mentioned, should not determine the *effect* there-

of, which is properly adjudicated in the non-bankruptcy forum when the creditor sues on his claim and the bankrupt pleads his discharge as a defense."

The text discusses the cases, especially *Local Loan Company* vs. *Hunt,* 292 U. S. 234, 24 A. B. R. (N.S.) 668, that case having been decided on the ground of exceptional hardship to a bankrupt.

Most of the cases dealing with this subject have reached the conclusion that the Bankruptcy Court should not in any way interfere with or attempt to relitigate proceedings had in a State Court, the subject matter of which was the question of the dischargeability of a particular debt.

In all of these cases, the court has carefully pointed out that it is the province of the State Court, either under the express provisions of Section 17 of the Act, or in considering whether or not a former discharge was waived by a new promise, to determine whether or not a particular indebtedness is in fact discharged by a prior bankruptcy proceeding.

On the other hand, the Courts have been equally emphatic in holding that a State Court had no jurisdiction or power to determine the question of whether or not the bankrupt should obtain a discharge, that question being exclusively reserved to and vested in a Bankruptcy Court.

As an illustration of this doctrine, we cite the case of In re: Bybee, 124 Fed. 1011 (Dist. Ct. N.D.

Cal., 1903) in which the Court *held* that the denial of a discharge upon a particular debt in a State Court insolvency proceeding was not res judicata and binding upon the bankruptcy court where it was later scheduled by the bankrupt.

In other words a claim, simply because of a denial of a discharge thereon in one proceeding, does not thereby become charged with *non-dischargeability forever.*

Another case based on this subject is Matter of Charles S. Baker, 275 Fed. 511; 47 ABR 255 (U. S. Dis. Ct. S.D., N.Y., Sept., 1921).

In this case, one Baker was adjudged a bankrupt in 1910 and discharged in 1911. In this proceeding, he failed to schedule a note in the sum of $281.10. Thereafter the creditor holding the note obtained a judgment thereon. More than six years thereafter, Baker filed a second petition in bankruptcy and scheduled the judgment.

It was contended that since the debt was not scheduled in the first bankruptcy proceeding, and therefore the discharge in that proceeding did not affect it, that it was *non-dischargeable* in the second bankruptcy proceeding. The Court, however, overruled this contention and said, at Page 512:

> "The only effect of failure to schedule is that an otherwise dischargeable debt is not discharged. Thereafter, the creditor may pursue his remedies unaffected by the discharge. When, however, more

than six years later, a new petition is filed, the bankrupt may schedule every outstanding debt, and be discharged in respect of a debt still existing, which had been omitted from the schedules of the first bankruptcy.

"Failure to schedule and consequent failure to discharge a particular debt does not operate to adjudicate that the debt is not dischargeable. There is no *res adjudicata* doctrine, because nothing had been adjudicated so far as affects an unscheduled debt. If a discharge is refused, then, of course, that refusal is *res adjudicata,* but, such is not this case. Cases cited by the attorney for the creditor are those where either (1) a discharge was previously refused or (2) where a previous petition in bankruptcy is still pending. Of course, where there is a refusal to discharge, the adjudication necessarily is that for the same reason justified by the statute the bankrupt cannot obtain a discharge of any of his debts.

"Where there is a previous proceeding pending, obviously the court will not entertain a second proceeding, so far, in any event, as affects debts existent at the time of filing the petition in the first proceeding. The case at bar, however, is different. Here the bankrupt did no act to bar his previous discharge and the effect of failure to schedule was merely to let the debt remain alive. When, therefore the bankrupt after six years seeks a discharge upon a new petition, the act contemplates that he may be discharged of any then existing debts."

Here again it will be readily seen that the doctrine of res judicata can only come into play where the Court denying the discharge or granting the discharge, as in this case, had before it for determination an issue on the very claim in question.

In the case of Matter of Dierck, 37 ABR (N.S.) 198 (U.S.D.C. S.D. N. Y. Apr., 1938), the Court held that where a bankrupt had omitted a claim from his schedules in his first proceedings and thereafter filed a second proceeding in which he scheduled the debt, but was unable to obtain a discharge in the second proceedings because the six years limitation had not elapsed, he could thereafter file a third proceeding and schedule the debt and a discharge would be good thereon.

The Court, in passing on this question, said on Page 199:

> "A debt omitted from schedule in a bankruptcy proceeding and for that reason not touched by the discharge obtained there may be discharged in a later proceeding in which application for discharge is made more than six years after the first discharge. *In re Baker* (D.C., N. Y.), 47 Am. B. R. 255, 275 F. 511; *In re Lyons* (D.C., N. Y.) 2 Am. B. R. (N.S.) 552, 287 F. 602; Remington on Bankruptcy, section 3585. Such a case is quite different from one where the debt was listed in the earlier proceeding but the bankrupt failed to apply for discharge or was denied discharge in that proceeding and then seeks to get a discharge from the same debt in a later proceeding, as in *In re Feigenbaum* (C.C.A., 2nd Cir.) 9 Am. B. R. 595, 121 F. 69, and similar cases. See *In re Zeiler* D.C., N.Y.), 33 Am. B. R. (N. S.) 627, 18 F. Supp. 539. It follows that while the debt due the dairy company survived the discharge in the first bankruptcy, it did not thereby acquire a permanently non-dischargeable character.
>
> "The second proceeding was altogether futile so far as discharge from debts was concerned be-

cause any application for discharge that might have been made in it would necessarily have been within the prohibited six years period. Under the circumstances, failure to get a discharge in that proceeding did not render this debt *bankruptcy-proof forever.*"

In the case of *Prudential Loan and Finance Company* vs. *Roberts,* 52 Fed. (2nd) 918 (C.C.A. 5th Cir. Oct., 1931) one Roberts was adjudicated a voluntary bankrupt in July, 1922, and was discharged in August, 1923. In February, 1926, he executed a note to Prudential Loan and Finance Company. In March he filed a second voluntary petition and scheduled this note. In April, 1927, he gave the Prudential Loan and Finance Company a new note upon which a judgment was entered in June, 1927. Roberts did not apply for a discharge on his second bankruptcy, but in December, 1929 filed a third petition, and in this third petition filed a petition for a discharge. All of these bankruptcy proceedings took place in the same court.

The Prudential Loan and Finance Company contended that since the debt upon which the judgment was later entered was scheduled in the 1927 bankruptcy in which no discharge was obtained that it could not be discharged in the second bankruptcy because of the doctrine of res judicata.

The Court, after quoting from the decision of *Bluthenthal* vs. *Jones,* 228, 208 U. S. 64; 52 L. Ed. 390 *held* that under the facts in that case the discharge, in the third proceeding, should be granted over the

objections of the Prudential Loan and Finance Company.

The court used the following language on Page 919:

> "The peculiarity of the case at bar which distinguishes it from others heretofore decided is that on looking to the records in the same court of Roberts' prior bankruptcies it is apparent that in the bankruptcy of 1927 there was an insuperable obstacle to a discharge, in that he had obtained a discharge in bankruptcy within six years prior to April 1, 1928, the last day on which he might make application. Title 11, U.S.C. Sec. 32 (a), and (b) (5), 11 U.S.C.A. 32 (a) and (b) (5). Had he applied, the discharge must necessarily have been denied for this reason, and we think this is the only thing that can on the facts shown by the record be fairly considered to be adjudicated by the default in not applying. Manifestly, the mere adjudication that Roberts was not on April 1, 1928 entitled to a discharge because six years had not elapsed since his last discharge on August 23, 1923, could not prove him disentitled on November 29, 1929. The refusal of a discharge because of a prior discharge within six years stands on a different footing from a refusal on any other ground set forth in title 11, U.S.C., 32 (b), 11 U.S.C.A. 32 (b). The other grounds all involve reprehensible conduct of the bankrupt which Congress intended to punish by a perpetual refusal to discharge him from the claims of his then creditors. The purpose in adding the ground relating to a prior discharge within six years was not to punish, but only to postpone a second discharge for that period of time. An ill-advised voluntary, adjudication, or an involuntary one on acts of bankruptcy which do not also defeat discharge, had within five years

of the granting of a prior discharge, and on which no discharge can possibly be granted, was not intended to result in making the provable claims of creditors *bankruptcy-proof forever. Such a construction would tend to defeat one of the main purposes of the act, to wit: The relief of honest debtors who surrender their property to their creditors.*" (Italics ours)

All of the above cases show how limited is the doctrine of res judicata on the subject of a discharge and that to enable this doctrine to be applied in a given case it must clearly appear that a Bankruptcy Court of competent jurisdiction actually passed upon the question of discharge in a given case.

The opinion of the Referee in this case has the effect, if his order is sustained, to make the indebtedness of Mildred McDonald a new class of indebtedness, not covered by any of the provisions of the Bankruptcy Act. It makes the claim of Mildred McDonald a non-dischargeable debt from the date of the new promise, and, in effect, adds to, and enlarges, the provisions of Section 17 of the Act.

In view of the decisions last quoted above, and of the mandate of the Act, itself, it must clearly appear that such a holding by this court would, in the language of the Supreme Court of the United States, Bluthenthal vs. Jones, supra, "defeat one of the main purposes of the Act to wit: The relief of honest debtors who surrender their property to their creditors."

The facts in the case at bar disclose that two

courts have dealt with the indebtedness of the objecting creditor, prior to the adjudication of the Bankrupt in these proceedings. The first court was the District Court, sitting in bankruptcy and dealing with the adjudication of this Bankrupt in 1931. In this proceeding, that court passed upon the question as to whether or not the indebtedness of Mildred McDonald, the present objection creditor, was a dischargeable obligation. The court determined that question in favor of the Bankrupt, and granted him a discharge. The second court to pass upon, or deal with, this obligation was the Circuit Court of Multnomah County, State of Oregon. That court held that Bernard G. Shepherd, Bankrupt in this proceeding, had, by a new promise, waived his defense of the discharge in his first bankruptcy proceeding, and entered a judgment against him.

The Referee, in his decision, upon which the order complained of here is based, uses the doctrine of res judicata as a basis for his opinion and order.

Out of which proceeding the res judicata relied upon by the Referee arose is not stated in his opinion. Either horn of the dilemma which confronts the objecting creditor in these proceedings, if the doctrine of res judicata is to be relied upon to support the Referee's order, must inevitably lead to a determination that the Referee's order is erroneous.

If the judgment relied upon is the judgment of the District Court in granting a discharge in the bank-

ruptcy proceedings of 1931, then the result is that the doctrine of res judicata is beneficial to the Bankrupt and not to the objecting creditor, because that judgment holds that this is a dischargeable debt. It has never been modified or overruled, and is still the law of the case, so far as the dischargeability of this indebtedness is concerned.

If the objecting creditor relies on the judgment of the Circuit Court of Multnomah County, Oregon, then the answer is that that court had no jurisdiction to determine whether or not this debt was or was not a dischargeable one in this proceeding. All that court had before it, and all that it determined or passed upon, was whether or not a new promise had been made by the Bankrupt, which made the discharge granted by the District Court in the former bankruptcy proceedings unavailable to the Bankrupt.

We, therefore, confidently assert that the doctrine of res judicata has nothing to do with the issues before this court and cannot be relied upon to support the order appealed from.

POINT II

We will discuss under this part of the argument, the issues raised by specifications of error 2, 9 and 10.

The court below, in affirming the order of the Referee discharging the bankrupt with qualifications, adopted the opinion of the Referee in all particulars

and held that the bankrupt, by making a new promise to pay the indebtedness of Mildred McDonald (now Mildred Muck), which was scheduled in his first bankruptcy proceeding and from which he obtained a discharge in that proceeding, waived his right to a discharge from this obligation forever. The conclusion so reached by the Referee, in his opinion, is apparently based on the rule adopted in most State Courts that a bankrupt, who has obtained a discharge from an indebtedness by making a new promise to pay such indebtedness, waives his right to plead such discharge as a defense when a subsequent action is brought on this indebtedness.

The Courts, in permitting a recovery on the new promise, have said that the new promise acts as a waiver by the bankrupt of his former discharge.

This waiver is not enforceable in a Bankruptcy Court as such, but always arises and becomes available in actions in State Courts, and it has been said that whether or not such a new promise is enforceable in any case is a matter of the law of the state where such action is brought.

> Remington on Bankruptcy, 5th Ed., Sec. 3499.50, Vol. 7, Pg. 756, and cases cited.

Since the State Courts have adopted the doctrine that a bankrupt's discharge may be waived by a subsequent promise, it becomes necessary to determine what is meant by the term "waiver".

There are many definitions of the term waiver, but every such definition embodies certain fundamental necessary elements.

Corpus Juris defines waiver as follows:

> "Waiver has been defined as a voluntary and intentional relinquishment or abandonment of a known *existing* legal right, advantage, benefit, claim or privilege which, except for such waiver, the party would have enjoyed." 67 C. J. Sec. 1, Pg. 289.

In speaking of the necessary elements of a valid waiver, Corpus Juris says:

> "In order to constitute a waiver, the right, benefit, or advantage in question must be in existence at the time, although it may be unenforceable. Waiver involves the voluntary relinquishment of some known right which is at the time available; thus, one cannot waive that which is not his as of right at the time of waiver; a person cannot waive a right before he is in a position to assert it. There can be no waiver of a *non-existent* or lost right." 67 C. J. Sec. 4, Page 299.

Applying the above rule to the facts before this Court in the instant case, it conclusively appears that the Bankrupt, in this case, could not have waived his right to a discharge in the present bankruptcy proceeding when he made a promise, prior to February 7, 1935, to pay the debt of Mildred McDonald which had been scheduled in his first proceedings and from which he had been legally discharged.

Prior to the date of the adjudication in bank-

ruptcy in 1941, being the present bankruptcy proceedings, Bernard G. Shepherd had no right to a discharge in such subsequent proceedings. This right to discharge only arose upon his adjudication in this proceeding which was long after the entry of the judgment in favor of Mildred McDonald (now Mildred Muck), which is scheduled in the present bankruptcy proceeding.

Bearing these principals in mind, just what right did the Bankrupt waive when he made the new promise to the objecting creditor in this case?

Did he waive the right to assert the discharge in bankruptcy granted to him in his first bankruptcy proceedings as a defense to the action which was thereafter immediately instituted against him in the State Court, or did he waive some other right which he then possessed?

Certainly, the only right that he could at that time waive was the right to plead the discharge in bankruptcy, which he then possessed, and had, from the bankruptcy proceedings of 1931.

He certainly did not waive the right to a discharge in this proceeding, because this proceeding did not then exist.

If it is argued that by making the new promise he waived the right to avail himself of the provisions of the Bankruptcy Act in the future, the conclusive answer is that, to so hold, would, in effect, nulify the

express provisions of the Bankruptcy Act which granted to him the absolute right to file subsequent proceedings in bankruptcy which would entitle him to all of the benefits and subject him to all of the responsibilities of the Act.

The Bankruptcy Act provides that one may file a voluntary petition in bankruptcy as often as it may become necessary in the conduct of his affairs. The only prohibition being that he can only obtain a discharge once in six years. When the bankrupt filed his petition in this case, he was required by the provisions of the Act to schedule all his provable debts including that of the objecting creditor. No provision of the act excepts such a claim as this from a discharge and to so hold is to write something into the Act which Congress has not seen fit to do.

The Referee, therefore, is in error when he holds and finds that by making the new promise to the objecting creditor after the entry of the discharge in his prior proceedings, he thereby waived all rights forever to the benefit of the Bankruptcy Act which are guaranteed to him by the solemn enactment of Congress.

POINT III

Specifications of Error 1.

The Referee holds, and finds, that the indebtedness which was the basis, and gave rise to the cause of ac-

tion, upon which the judgment of the Circuit Court of Multnomah County, Oregon is based, was the old original debt scheduled in the first bankruptcy proceedings of Bernard G. Shepherd.

The Referee admits that the general rule followed by most of the courts, both State and Federal, is that the cause of action in such a case as this is, in fact, a new obligation and not the old debt.

All of the decisions referred to and cited by the Referee in his opinion admit that the cause of action, in order to be maintainable, must have something more than the original indebtedness existing at the time of the first adjudication in bankruptcy.

It is the old indebtedness, plus the new promise. Both must exist when the action is brought, or a recovery cannot be had. Many of the cases say that the new promise revives the obligation. Most of them, however, state that the new promise operates as a waiver.

The Referee referred to the case of United States National Bank of LaGrande vs. Miller, 118 Oregon, 280; 246 Pacific, 726; and states that this case is an authority for the proposition that this cause of action is on the old indebtedness. An examination of this case shows that the court said that the consideration for such a new promise is the moral obligation of the debtor, using the following language, at page 291:

"The law is well settled that a discharge in bank-

> ruptcy, while releasing the bankrupt from liability to pay a debt that is provable in the bankruptcy proceedings, leaves him under a moral obligation sufficient to support a new promise by the debtor to pay the debt, which may be enforced against him."

The Referee holds that authorities, relying upon the doctrine of moral obligation as a consideration to support the new promise to pay the debt, are not sound, citing Williston on Contracts. However, the law in Oregon is to the contrary, and, we believe, should be followed by this court.

In every such case, the pleadings must disclose not only the old indebtedness, but the new promise.

Surely, the cause of action has to be based upon more than the old indebtedness. The element of a new promise is absolutely essential to the maintenance of the cause of action, and the resulting judgment embodies within it both of these elements.

It is, therefore, submitted that the cases which hold a judgment based upon a new promise in such a case as this is an entirely new indebtedness should be followed by this court.

This is the majority rule in the United States:

Matter of Cox, 47 ABR (N.S.) 668, 33 F. Supp. 796.
8 Corpus Juris Secundum, Section 583 (d) Pg. 1577.
Wolffe vs. Eberlein, 74 Ala. 99, 49 Am. Rep. 809.
Matthewson vs. Needham, 81 Kan. 340, 105 Pac. 436, 26 LRA (N.S.) 274.

6 Am. Jur. 535.
Holden vs. Chamberlin, 46 N.D. 353; 179 N.W. 706.

In the last mentioned case, the Supreme Court of North Dakota, in its opinion, point out the reasons why the new promise must, in fact, be a new cause of action, and a new indebtedness, in language which the writer of this brief believes to be unanswerable. The court said:

> "The writer, speaking for himself, is of the opinion that a debt or obligation discharged in bankruptcy, while not paid, is wholly extinguished, so far as any future legal liability upon it is concerned; that the debt or obligation no longer exists; that there remains only, after such discharge, the moral obligation to pay the debt; that this moral obligation may be and is, a sufficient consideration for a new contract to pay the debt discharged; that in making such new contract, based upon such moral obligation, the minds of the parties must meet upon all the terms in the same manner and to the same effect as upon any other contract; that is, if the debt for a given amount is discharged in bankruptcy, and the debtor makes a definite promise, after the adjudication, to pay the amount of the debt discharged, stating in such promise certain amounts of the debt to be paid at different times, or promising to pay it all at a certain time, that before a new contract is actually made, which is binding upon both parties, such terms contained in the promise must be accepted by the creditor, and thus constitutes a new contract for the amount of the debt—in other words a new debt—the moral obligation to pay the debt discharged being a sufficient consideration for the new contract."

An illuminating case on this subject is the recent case of Matter of Cox, 47 ABR (N.S.) 668. (U.S. Dis. Ct. W.D.K. July 9, 1940).

In this case Cox, the bankrupt, was adjudicated as such on the 26th day of February, 1937. He made timely application for a discharge which had not been granted at the time the proceedings discussed in the case were had.

Among the debts listed in his schedule was one in favor of the Personal Finance Company. After his adjudication, the Personal Finance Company filed a suit in the State Court in which it alleged, among other things, that the bankrupt made a new promise to pay the debt involved in the suit after his adjudication in this bankruptcy. A judgment was entered against Cox by default.

The Personal Finance Company then proceeded to enforce this judgment in the State Court and the bankrupt petitioned the Bankruptcy Court for a stay.

The bankrupt contended that the Bankruptcy Court had jurisdiction to grant the stay because the claim upon which the judgment was entered in the State Court was dischargeable in his then pending bankruptcy proceedings and that such judgment was, in fact, void. He also contended that no action could be brought upon a new promise until after the question of his discharge had been determined.

The Personal Finance Company contended that this action in the State Court was upon a new promise, made after adjudication, which created an entirely new and separate valid obligation.

District Judge Miller reviewed a large number of decisions on this question, and *held* that the new promise, made after an adjudication even before a discharge was granted, created an entirely new, separate and valid obligation, and that this obligation, having arisen subsequent to the adjudication was like any new debt, unaffected by the prior bankruptcy proceedings. The Court said, on page 673:

> "The authorities throughout the country are in conflict on this issue with the weight in favor of the view that the action lies upon the new promise. See 3 R.C.L., Bankruptcy, Sec. 147; 8 Corpus Juris Secundum, Bankruptcy, Sec. 583, sub-division (d).
>
> "Since the action in the state court was upon a promise made after the adjudication in bankruptcy which created a new obligation as of that time, it is not an action on a claim provable or dischargeable in bankruptcy, and accordingly the bankruptcy court has no jurisdiction to interfere with the enforcement of that judgment. Obligations coming into existence after the filing of the petition in bankruptcy, although before the granting of the discharge, are not affected by the discharge subsequently granted which relates back to the filing of the petition."

This is the most recent case that we have been able to find on this particular subject, and since the court in that case states unequivocably that the weight of

authority is that a new promise gives rise to a new and distinct obligation, we feel safe in saying that that should be the rule in this jurisdiction, and in this court.

Clearly, therefore, if the promise made by the bankrupt subsequent to his adjudication in his bankruptcy proceeding in 1931 created a new and distinct obligation from that scheduled in 1931 it should stand in the same position as any new debt incurred by the Bankrupt subsequent to his adjudication in 1931 and as such is dischargeable in his present proceedings.

Finally, we call the court's attention to the case, *Bluthenthal* vs. *Jones,* 208 U. S. 64; 52 L. Ed. 390.

In this case, the Supreme Court of the United States held that in order for a creditor whose debt had been scheduled in a first bankruptcy proceeding in which a discharge was denied to keep such debt from being discharged in a second bankruptcy where it was scheduled, that such creditor must interpose objections to the second discharge in the Bankruptcy Court, and failing so to do could not thereafter plead that the discharge in the second proceedings was not binding on such debt.

The facts discussed by the Court were these:

Jones, a bankrupt, obtained a discharge in a bankruptcy proceedings, begun by him in the District Court of the United States in Florida on August 3, 1903, his discharge having been entered on November

7, 1903. The debt involved was one provable in that bankruptcy proceeding, and would be barred by the discharge in that proceeding were it not that Jones, in a prior proceeding in bankruptcy, had scheduled the same debt and the same creditor, Bluthenthal & Bickart, had objected to his discharge in this first proceeding and his discharge had been denied.

In the second proceeding in which the claim of *Bluthenthal & Bickart* was listed, they did not, as creditors, either prove their claim or enter any objections to the bankrupt's discharge.

After his discharge in the second bankruptcy proceeding, Bluthenthal & Bickart started a proceeding in the State of Florida to enforce their judgment. The Bankrupt pleaded his second discharge and Bluthenthal & Bickart, the creditors, set up the fact that this second discharge did not constitute a bar to the enforcement of their judgment because of the fact that the bankrupt had been denied a discharge in the first bankruptcy proceeding in which their claim had also been listed.

The Supreme Court of the United States *held* that the second discharge in bankruptcy was res judicata and binding on all Courts, and that if the creditor wished to prevent the discharge of its claim in the second proceeding, it should have set up that matter in the Bankruptcy Court in the proceeding which led up to and resulted in the second discharge. Having failed to do this, the Bankruptcy Court in the second

proceeding had an exclusive jurisdiction to determine the question of discharge in that proceeding. Its grant of a discharge was res judicata in all Courts.

The Supreme Court pointed out that the State Court had no jurisdiction to examine into the question of dischargeability or non-dischargeability of this claim by reason of the denial of the bankrupt's first discharge because that court was bound by the later adjudication which granted a discharge in the second proceeding.

The Supreme Court, in passing on the question, said, Pg. 392:

> "Section 1 of the bankruptcy act defines a discharge as 'the release of a bankrupt from all of debts which are provable in bankruptcy, except such as are excepted by this Act.'
>
> "Section 14 of the amended act, which was applicable to the second proceedings, provides that after due hearing the court *shall discharge* the bankrupt, unless he has committed one of the six acts specified in that section. Section 17 of the amended act provides that a discharge in bankruptcy shall release a bankrupt from all of his provable debts, with four specified exceptions, which do not cover this case. The discharge appears to have been regularly granted, and, as the debt due to Bluthenthal & Bickart is not one of the debts which, by the terms of the statute, are excepted from its operation, on the face of the statute the bankrupt was discharged from the debt due to them. There is no reason shown in this record why the discharge did not have the effect which it purported to have. Undoubtedly, as in all other judicial proceedings, an adjudication refusing a

discharge in bankruptcy finally determines, for all time and in all courts, as between those parties or privies to it, the facts upon which the refusal was based. But courts are not bound to search the records of other courts and give effect to their judgments. If there has been a conclusive adjudication of a subject in some other court, it is the duty of him who relies upon it to plead it or in some manner bring it to the attention of the court in which it is sought to be enforced. Plaintiffs in error failed to do this. When an application was made by the bankrupt in the district court for the southern district of Florida, the judge of that court was, by the terms of the statute, bound to grant it, unless upon investigation it appeared that the bankrupt had committed one of the six offenses which are specified in § 14 of the bankruptcy act, as amended. An objecting creditor might have proved upon that application that the bankrupt had committed one of the acts which barred his discharge, either by the production of evidence, or by showing that in a previous bankruptcy proceeding it had been conclusively adjudicated, as between him and the bankrupt, that the bankrupt had committed one of such offenses. If that adjudication had been proved, it would have taken the place of other evidence and have been final upon the parties to it. But nothing of this kind took place. Bluthenthal & Bickart intentionally remained away from the court and allowed the discharge to be granted without objection.

"Since the debt due to the plaintiffs in error was a *debt provable in the proceedings before the District court in Florida, and was not one of the debts exempted by the statute from the operation of the discharge, it was barred by that discharge.*" (Italics ours)

Whether the cause of action upon which the judgment of Mildred McDonald, the objecting creditor,

which ripened into a judgment in the Circuit Court of Multnomah County, Oregon, and which was scheduled in these proceedings, was the old indebtedness scheduled in the original bankruptcy proceedings in 1931 or is, as we contend, an entirely new obligation, does not, in our opinion, effect the question now to be decided.

Bernard G. Shepherd is entitled, as a matter of law, and a matter of right, to a discharge in these proceedings from this judgment in either case.

The doctrine of res judicata, relied upon by the Referee in his opinion, has no application to the facts in this record.

The doctrine of waiver cannot apply without denying and refusing to the Bankrupt the benefits of the Bankruptcy Act enacted by the Congress of the United States.

The Bankruptcy Act expressly enjoins upon this court the absolute duty to grant a discharge to this Bankrupt unless it clearly appears that he has been guilty of some of the acts prohibited in subdivision (c) of Section 14 of the Bankruptcy Act.

The record in this case shows as follows:

1. The Bankrupt herein filed his voluntary petition in these proceedings, as he had a right to do, under the provisions of the Bankruptcy Act.

2. The Bankrupt scheduled the judgment of Mil-

dred McDonald, the objecting creditor, in these proceedings, as he was required to do by the Bankruptcy Act.

3. The Bankrupt paid all of the costs and expenses of this proceeding.

4. The judgment of Mildred McDonald was a provable debt and was proven in these proceedings.

5. The Bankrupt has obeyed all of the orders of this court in these proceedings.

6. No facts showing a violation of any of the prohibited acts set forth in subdivision (c) of Section 14 of the Act are shown in the record or are relied on by the objecting creditor.

The above facts show conclusively that an unconditional discharge should have been granted in this case to the Bankrupt.

To ask this court to deny the Bankrupt a discharge in these proceedings against the indebtedness due Mildred Muck, the objecting creditor, is to ask this court to wholly disregard the express provisions of the Bankruptcy Act; is to ask this court to disregard the plain and emphatic directions of Congress as embodied in the Bankruptcy Act.

For this court to disregard the act, and to find some theoretical, impracticable, unsound rule of construction upon which to base an order denying a discharge in this case, would be to make this court a

legislative agency, and not a judicial one.

A holding of this court that the Bankrupt in this case is not entitled to a discharge from the judgment of Mildred Muck would result in adding to the provisions of the Bankruptcy Act a requirement that an indebtedness upon which a discharge had once been granted, and later revived by a new promise, constitutes a new ground for denying a discharge and, in effect, adding a new ground for objection to a discharge which is not contained in the Act.

Had Congress intended any such result, this ground would certainly have been included in the Act, itself; not being so included, it is not available as a ground of objection and cannot be enforced as such in a bankruptcy court.

CONCLUSION

We respectfully submit that the order, from which this appeal is taken, is erroneous and should be overruled, corrected, and an order entered granting to the Bankrupt a full and complete discharge from all indebtedness including the judgment of Mildred Muck.

Respectfully submitted,

CHRISTOPHERSON & MATTHEWS and
PAUL M. LONG,

COAN & ROSENBERG,
RALPH A. COAN,

Attorneys for Appellant.

APPENDIX A-1

Section 14, Bankruptcy Act, 11 USCA, Sec. 32

DISCHARGES, WHEN GRANTED

"a. The adjudication of any person, except a corporation, shall operate as an application for a discharge: *Provided,* That the bankrupt may, before the hearing on such application, waive by writing, filed with the court, his right to a discharge. A corporation may, within six months after its adjudication, file an application for a discharge in the court in which the proceedings are pending.

b. After the bankrupt shall have been examined, either at the first meeting of creditors or at a meeting specially fixed for that purpose,, concerning his acts, conduct and property, the court shall make an order fixing a time for the filing of objections to the bankrupt's discharge, notice of which order shall be given to all parties in interest as provided in Sec. 58 (94) of this Act. (Title). Upon the expiration of the time fixed in such order or of any extension of such times granted by the court, the court *shall discharge the bankrupt* if no objection has been filed; otherwise, the court shall hear such proofs and pleas as may be made in opposition to the discharge, by the trustee, creditors, the United States attorney, or such other attorney as the Attorney General may designate, at such time as will give the bankrupt and the objecting parties a reasonable opportunity to be fully heard.

c. *The Court shall grant the discharge unless* satisfied that the bankrupt has (1) committed an offense punishable by imprisonment as provided under this Act (Title); or (2) destroyed, mutilated, falsified, concealed, or failed to keep or preserve books of account or records, from which his financial condition and business transactions might be ascertained, unless the court deems such acts or failure to have been

justified under all the circumstances of the case; or (3) obtained money or property on credit, or obtained an extension or renewal of credit, by making or publishing or causing to be made or published in any manner whatsoever, a materially false statement in writing respecting his financial condition; or (4) at any time subsequent to the first day of the twelve months immediately preceding the filing of the petition in bankruptcy, transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed, any of his property, with intent to hinder, delay, or defraud his creditors; or (5) has within six years prior to bankruptcy been granted a discharge, or had a composition or an arrangement by way of composition or a wage earner's plan by way of composition confirmed under this Act (Title); or (6) in the course of a proceeding under this Act (Title) refused to obey any lawful order of, or to answer any material question approved by, the court; or (7) has failed to explain satisfactorily any losses of assets or deficiency of assets to meet his liabilities: *Provided,* That if, upon the hearing of an objection to a discharge, the objector shall show to the satisfaction of the court that there are reasonable grounds for believing that the bankrupt has committed any of the acts which, under this subdivision (c), would prevent his discharge in bankruptcy, then the burden of proving that he has not committed any of such acts shall be upon the bankrupt * * * * * *." (Italics ours)

Section 17, Bankruptcy Act, 11 USCA, Sec. 35

DEBTS NOT EFFECTED BY A DISCHARGE

"a. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as (1) are due as a tax levied by the United States, or any State, county, district, or municipality; (2) are liabilities for obtaining money or property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another, or for alimoney due to or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for breach of promise of marriage accompanied by seduction, or for criminal conversation; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity; or (5) are for wages which have been earned within three months before the date of commencement of the proceedings in bankruptcy due to workmen, servants, clerks, or traveling or city salesmen, on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; or (6) are due for moneys of any employee received or retained by his employer to secure the faithful performance by such employee of the terms of a contract of employment."